THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03-02-2007

CORAM

THE HON'BLE MR. JUSTICE J.A.K.SAMPATH KUMAR

A.S. No.386 of 1991

A. Natarajan .. Appellant/Plaintiff

vs

1.Ponniammal alias Ponnammal
2.M/s.Udaya Hardwares, represented
by Rajadasa Nadar, Madras-94.
(Second Respondent is impleaded as per the Order of the Court in C.M.P. No.13661/1991 dated 29-10-1991)

.. Respondents/Defendant

Appeal under section 96 of CPC filed against the judgment and decree of the learned XIII Assistant Judge, City Civil Court, Chennai dated 18.04.1990 in O.S.No.5332 of 1987.

For appellant ... Mr. V.Narayanaswami
For respondent-1 ... Mr. G.S.Selvatharasu
For respondent-2 ... Mr. A.Chidambaram

JUDGMENT

This Appeal is filed against the Judgment and Decree dated 18.04.1990 in O.S.No.5332 of 1987 on the file of City Civil Court, Chennai, in and by which the learned Subordinate Judge after analysing the evidence in depth found that the plaintiff is not entitled to the suit claim and accordingly dismissed the suit.

2) For convenience, the parties are referred as arrayed in the suit.

3) The plaintiff states as follows:

The plaintiff entered into an agreement of sale with the defendant on 21.8.1981 for the purchase of the premises bearing Door No.35-B, Ashok Nagar Scheme, Madras of an extent of 1500 sq.ft for a total consideration of Rs.30,000/-.

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4) The defendant was an Allottee from the Tamil Nadu Housing Board and therefore, undertook to get clearance from the Housing Board for effecting sale of the property to the plaintiff after paying the entire instalments to the Housing Board.

5) On the date of the said agreement, the plaintiff paid Rs.4,000/- to the defendant by way of advance, undertaking to pay Rs.6,000/- on or before 10.09.1981 and the balance amount to be paid at the time of registration within 90 days from the date of the agreement on the assumption and understanding that the defendant will get the clearance from the Tamil Nadu Housing Board before the stipulated time.

6) Though the plaintiff has performed his part of contract as per the agreement after paying the amounts referred therein, the defendant failed and neglected to perform his part of contract. Hence, the suit.

7) The defendants state as follows:

The execution of the sale agreement executed between the plaintiff and the defendant was forbidden by law. The rules of Tamil Nadu Housing Board did not permit the same. The plaintiff was also aware of the same. Since, the agreement is unlawful, the agreement cannot be enforced in the Court of law. Hence, the suit has to be dismissed in limine.

8) The plaintiff was examined as PW.1. Ex.A1 to Ex.A7 marked on the side of the plaintiff to prove his claim. The husband of the defendant was examined as DW.1. The Lower Court after analysing the evidence in depth found that the plaintiff is not entitled to the suit claim and accordingly dismissed the suit.

9) Heard Mr. V.Narayanaswami, learned counsel appearing for the appellant, Mr. G.S.Selvatharasu, learned counsel appearing for the first respondent, and Mr. A.Chidambaram, learned counsel appearing for the second respondent.

10) Upon hearing the rival contentions, the points for consideration are:-

1) Whether the suit agreement is executable under law?
2) Whether the plaintiff is entitled for the relief sought for in terms of the agreement?
3) Whether the suit is barred by limitation?
4) Whether the plaintiff was ready and willing to pay consideration to perform his part of contract at any point of time?
5) Whether the plaintiff is entitled for the return of the advance amount?
6) Whether the findings of the Lower Court in dismissing

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the suit is in order?

11) Point Nos.1 & 2:

It is true that there is an agreement of sale entered into between the plaintiff and the defendant on 21.8.1981 for a total consideration of Rs.30,000/-. It is also true that the defendant received a sum of Rs.4,000/- on the date of the agreement. There is no dispute regarding this aspect. Subsequently, the defendant has also paid a sum of Rs.1,400/- to the Tamil Nadu Housing Board on 28.8.1981 after receiving the said amount from the plaintiff. Ex.A1 and Ex.A2 are proof to this effect. There is no dispute regarding this aspect.

12) The recitals of Ex.A1 are important to find out whether the plaintiff is entitled to the suit relief. The conditions 3 and 4 of the agreement of sale Ex.A1 reads as follows:-

> "3. The sum of Rs.6,000/- (Rupees six thousand only) will be paid the Party of the Second Part to the Party of the First Part on or before 10.9.1981 and the balance amount will be paid at the time of registration of the plot to the Party of the First Part or its nominee within 90 days from the date of this agreement.
>
> 4. If the Party of the First Part commits breach of the agreement, he shall not only refund all the amount paid the party of the Second Part but shall also pay 12% interest and Rs.1,000/- by way of liquidated damages."

As per the said agreement, in case of breach of agreement by the defendant, the plaintiff is entitled to get back the amount paid by him to the defendant along with interest at 12% p.a. He has also entitled to get a sum of Rs.1,000/- by way of liquidated damages from the defendant. Even according to the plaintiff, the defendant has committed breach of the agreement. If that is so, as per the agreement, the plaintiff is entitled for the return of advance paid by him with interest at 12% p.a along with a sum of Rs.1,000/- by way of liquidated damage. The plaintiff is not entitled for getting the sale deed executed by the defendant in his favour in respect of the property referred in the agreement. The learned counsel for the appellant/plaintiff submitted that, though there is no specific averments in the agreement of sale regarding the execution of the sale deed, as per the provision of the Specific Relief Act the plaintiff is entitled for such relief. Such contention of the learned counsel for the Appellant/plaintiff is bereft of any merit in view of the fact that no such plea was taken by the plaintiff at any point of time.

13) Admittedly, the disputed property was allotted to the defendant under the hire purchase agreement by the Tamil Nadu

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Housing Board. Till the entire amount paid by the party and obtained a sale deed in his favour, the allottee has no alienable right. In such view of the fact, the present agreement of sale was entered into between the parties to the proceedings, when the defendant has no alienable right. The learned counsel for the appellant/plaintiff drew my attention to Section 13(1)(b) of Specific Relief Act and contended that the suit agreement is valid, though the defendant had no alienable right on that day. Section 13(1)(b) of Specific Relief Act reads as follows:

> 13. Rights of Purchaser or lessee against person with no title or imperfect title:
> (1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights namely:-
> (b)"Where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;"

To give effect to this provision of law, the plaintiff filed a petition to implead the Tamil Nadu Housing Board as a party to the proceedings. But the same has been dismissed. Against which C.R.P. Was filed and the same was also dismissed. It is proved beyond doubt that the defendant had no alienable right on the date of agreement. Even otherwise, the plaintiff did not have a right to get the sale deed executed by the defendant as per the terms of the agreement. As per the agreement, the plaintiff will be satisfied in getting back the amount paid by him together with interest at 12% p.a along with Rs.1,000/- by way of liquidated damage in case of breach of agreement by the defendant.

14) At this juncture, it is useful to refer Section 14(1)(a) of the Act. It reads as follows:

> 14. Contracts not specifically enforceable:
> (1) The following contracts cannot be specifically enforced, namely:-
> (a) " A contract for the non-performance of which compensation in money is an adequate relief;"

In this case, adequate compensation in terms of money is spell out in the agreement of sale in case of breach of agreement by the defendant. By reading the provisions of Section 13(1)(b) along with Section 14(1)(a), I am satisfied that the plaintiff is not entitled to get a sale deed executed by the defendant in terms of

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the agreement of sale, as the defendant has no alienable right on the date of the sale agreement. The Lower Court has taken note of this point and rightly held that the plaintiff is not entitled to suit claim and accordingly negatived the suit claim. I do not find any illegality or impropriety in the findings of the Lower Court. The findings of the Lower Court is in order; does not require any interference. Hence these issues are answered against the appellant/plaintiff.

15) Point No.3:

The learned counsel for the appellant/plaintiff would contend that the limitation prescribed under agreement for the execution of the sale deed is not applicable to the case on hand as there was an understanding to extend the period of limitation for the execution of the sale deed and that the suit has been filed within 3 years from the date of refusal of the defendant to execute the sale deed and as such the suit is not barred by limitation. The learned counsel for the appellant relied on the decisions reported in 1) 2006 (3) MLJ Page 617; and

2) 2006 (3) MLJ Page 81.

in support of his contention. The learned counsel for the respondent would contend that since the period of limitation for the execution of the sale deed is prescribed under the agreement, the starting point of limitation would commence on the expiry of period prescribed thereon and that the present suit was filed beyond three years from the date of expiry of the period prescribed thereon and as such the suit is barred by limitation. He relied on the decisions reported in

1)1999 (1) MLJ Page 433;

2) 1999 (1) MLJ Page 726; and

3) 2006 (4) CTC Page 326;

in support of his contentions.

16) The legal points raised by the learned counsel for the appellant and respondents have been considered in detail. In this case, the period for the completion of the sale transaction has been specifically prescribed under the agreement. The specific recital in the agreement at dispute reads as follows:

> "3. The sum of Rs.6,000/- (Rupees six thousand only) will be paid the Party of the Second Part to the Party of the First Part on or before 10.9.1981 and the balance amount will be paid at the time of registration of the plot to the Party of the First Part or its nominee within 90 days from the date of this agreement."

In such circumstance, since there is a failure in performance of conditions prescribed under the Act and that 90 days period has been prescribed for the registration of agreement, the period of limitation to file the suit starts from 10.2.1981. In such circumstance, the present suit ought to have been filed on or

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before 10.2.1984. Whereas, the suit has been filed only on 7.7.1987.

17) The principle laid down in the decision cited by the counsel for the respondent reads as follows: " The period begins to run from the date fixed for the performance or when the plaintiff has noticed that the performance is refused. " as per Section 54 of the Limitation Act only in case where there is no period fixed for the performance of contract, the starting point of limitation starts from the date in which the performance is refused by either of the party. Taking note of the principle laid down in the ruling cited by the counsel for the respondent, I am satisfied the suit is barred by limitation.

18) However, the learned counsel for the appellant would contend that though the date has been fixed for the performance of the contract, by understanding the period of performance of contract has been extended periodically and as such the limitation starts from the date in which the performance was refused by either of the parties. He also drew my attention with regard to the principle laid down in the decision cited by him.

19) Only in case where there was an understanding between the parties to the proceedings for the extension of the period for the performance of the contract, periodically, the principle laid down in the said ruling is applied. It is not the case of the plaintiff in the suit that the period of limitation for performance of contract has been extended periodically by extension and that the suit has been filed within three years from the date of refusal of performance of contract and therefore, the suit is within time. Nowhere in his evidence, the plaintiff has stated that the period of limitation for the performance of the contract has been extended periodically by understanding between the parties to the proceedings. Without a specific plea in this regard, which is a question of fact, it is not open to the appellant/plaintiff to contend that the suit is not barred by limitation citing the said decision. So, i am satisfied that the decision cited by the learned counsel for the appellant with regard to the period of limitation is not applicable to this case on hand. The Lower Court has taken note of this point and rightly come to the conclusion that the plaintiff is not entitled to suit claim and accordingly negatived the suit claim. I do not find any illegality or impropriety in the findings of the Lower Court. The findings of the Lower Court is in order; does not require any interference. Hence this issue is answered against the appellant/plaintiff.

20) Point No:4

The learned counsel for the plaintiff contended that the

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plaintiff is always ready and willing to perform his part of contract as per the agreement and that the defendant alone was evading and that the plaintiff complied all the conditions stipulated under the Transfer of Property Act to get the sale deed executed in his favour by the defendant and therefore this plaintiff can sustain the suit. He also relied on the decision reported in

1)AIR 1986 S.C. Page 1912; and

2) 1987(2) M.L.J. Page 317;

in support of his contention. The learned counsel for the respondent/defendant would contend that the plaintiff was not ready and willing to perform his part of contract at any point of time and that he was not having sufficient funds to comply with the conditions of the agreement and therefore, the plaintiff cannot sustain his claim. I have gone through the evidence of the plaintiff in detail. The agreement of sale was entered into between the plaintiff and the defendant on 21.8.1981 and the suit was filed on 7.7.1987. The plaintiff has not filed any proof to show that in between those period he has possessed of sufficient funds to comply the conditions stipulated in the agreement. Nowhere, he had stated that he has possessed of sufficient funds to comply the conditions of the agreement at any point of time. Even otherwise, if the plaintiff was always ready and willing to perform his part of contract, he would not have waited for six years to file the suit. If really, the plaintiff was ready and willing to perform his part of contract, he would have filed the suit immediately when the defendant refused to comply the request of the plaintiff. The refusal letter has been marked as Ex.A7. It is dated 9.1.1986. Even after refusal by the defendant to execute the sale deed, the plaintiff has taken 1-1/2 years to file the suit to sustain his claim. This conduct of the plaintiff also shows that the plaintiff was not ready and willing to perform his part of contract as per the agreement. The Lower Court has dealt this point in detail and rightly come to the conclusion that the plaintiff is not entitled to suit claim and accordingly negatived the suit claim. I do not find any illegality or impropriety in the findings of the Lower Court. The findings of the Lower Court is in order; does not require any interference. Hence this issue is answered against the appellant/plaintiff.

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21) Point No.5:

The counsel for the appellant/plaintiff would contend that in case of rejection of the claim of the plaintiff, the defendant may be directed to return of the advance amount. It is true that the advance amount is still with the defendant. It is also true that as per the defendant's claim, the sale agreement would not fructifie, as such the agreement is unlawful as per the conditions of the allotment order. In spite of knowing the fact that the defendant would not execute any sale deed in favour of the

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plaintiff as he has no alienable right, he received the advance amount from the plaintiff under some pretext, which is not lawful. Therefore, the plaintiff is entitled for the return of the advance amount. In such view of the fact, the defendant is directed to pay the amount received from the plaintiff towards the agreement of sale with interest at 12% p.a from the date of receipt of the amount till the date of realisation. Hence, this issue is answered in favour of the appellant/plaintiff.

22) Point No.6:

In view of the findings rendered in Point Nos.1 to 5, I am satisfied that the Lower Court has analysed these points in detail and rightly come to the conclusion that the plaintiff is not entitled to suit claim and accordingly negatived the suit claim. I do not find any illegality or impropriety in the findings of the Lower Court. The findings of the Lower Court is in order; does not require any interference. Hence this issue is answered against the appellant/plaintiff.

23) But,the defendant is directed to pay the amount received from the plaintiff towards the agreement of sale with interest at 12% p.a from the date of receipt of the amount till the date of realisation. Failing to comply with the above direction, the plaintiff can resort to file Execution Proceeding to recover the same on the basis of this Order.

24) In the result, this appeal fails and accordingly the appeal is dismissed. But,the defendant is directed to pay the amount received from the plaintiff towards the agreement of sale with interest at 12% p.a from the date of receipt of the amount till the date of realisation. Failing to comply with the above direction, the plaintiff can resort to file Execution Proceeding to recover the same on the basis of this Order. The parties are directed to bear their respective costs.

mra

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Registrar, City Civil Court, Chennai

2. The Section Officer,VR Section, High Court, Madras

+ 1 cc to Mr. A. Chidambaram, Advocate, SR No.6596

+ 1 cc to Mr. V. Narayanasami, Advocate, SR No.6445

NG(CO)
SR/23.2.2007

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